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Supreme Court of the United States

October Term, 1950

EASTERN AIR LINES, INC., *Petitioner,* —v.— CIVIL AERONAUTICS BOARD, *Respondent.*	No. 714

REPLY BRIEF OF EASTERN AIR LINES, INC., PETITIONER

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The brief filed by the Respondent, Civil Aeronautics Board, sets forth little which has not already been adequately answered in Eastern's petition and brief in support of the petition.

The Board's brief raises one point not discussed fully in Eastern's original brief—the Board's rather indefinite suggestion that the case may be moot, at least in part. Eastern did not anticipate that such a suggestion would be made in view of the fact that the exemption authority involved in this case was and is in effect and is certain to remain in effect until long after this Court's ruling on the matter.

Indeed, the Board concedes (its brief, pp. 12-13) that this case is not moot if *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U. S. 498 (1911) and the many decisions which have followed it still represent the law. As will be demonstrated hereinafter, those decisions set forth the correct rule of law applicable to this case, and this case is not moot.

Other arguments made by the Board will be discussed preliminarily.

A. *The Decision of This Court in Riss & Co. v. United States, 71 Sup. Ct. 620 (U. S. 1951) Requires Reversal of the Decision of the Court of Appeals.*

The primary question in this case is whether a hearing is required prior to action on an exemption application involving new route authority where the applicable statutory provisions do not specifically mention a hearing requirement but do specify that the Board must make "findings" before acting.

Substantially the same question was before this Court in *Riss & Co.* v. *United States,* 71 Sup. Ct. 620 (U. S. 1951). As appears from the decision of the three-judge District Court in that case (96 F. Supp. 452, 454 (W. D. Mo. 1950)), the statutory provision there involved was Section 207 (a) of the Interstate Commerce Act (49 U. S. C. Section 307 (a)) which authorizes the Interstate Commerce Commission to issue a certificate of public convenience and necessity to any qualified motor carrier "if it is found that the applicant is fit, willing and able to properly perform the service proposed * * * and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity." It will be noted that, just as in this case, the statute involved in the *Riss & Co.* case required the administrative agency to make findings, but did not specifically require a hearing.

The lower court in the *Riss & Co.* case decided that the absence of a specific requirement of a hearing called for the conclusion that adjudication of applications for motor carrier certificates of public convenience and necessity need not "be determined on the record after opportunity for an agency hearing" within the meaning of Section 5 of the Administrative Procedure Act. The lower court distinguished *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950) on the ground that there was no constitutional or "due process" requirement of a hearing on an application for a certificate. Many of the contentions made by the

Board in its brief in this case were presented to the lower court in the *Riss & Co.* case, and were adopted by it.

In a *per curiam* order on April 16, 1951, the Supreme Court reversed the decision of the lower court in *Riss & Co.* v. *United States,* stating as follows: "The judgment is reversed. *Wong Yang Sung* v. *McGrath,* 339 U. S. 33, 70 S. Ct. 445, 94 L. Ed. 616."

This Court's reliance on the *Wong Yang Sung* case to reverse the decision of the District Court in the *Riss & Co.* case would seem to mean at least one of three things: (1) That there is a constitutional or "due process" requirement of a hearing in cases involving requested new route authority—"due process" being the specific basis for the decision in the *Wong Yang Sung* case; (2) that the decision of the lower court in the *Riss & Co.* case is deemed to conflict with the general policy announced by the Supreme Court in the *Wong Yang Sung* case that so far as the terms of the Administrative Procedure Act warrant, the courts should "give effect to its remedial purposes where the evils it was aimed at appear"; or (3) that a requirement of a hearing is to be inferred from a statutory duty imposed on the agency to make "findings", just as such a requirement may be inferred from the due process provisions of the Constitution (see Senator McCarran's comment on the *Wong Yang Sung* case discussed at pages 15-16 and 40-43 of Eastern's petition and brief in this case).

Any one or more of the above-listed possible meanings of this Court's action in the *Riss & Co.* case would require reversal of the decision of the Court of Appeals in this case, for the two cases are closely analogous, the principal factual distinction being that the *Riss & Co.* case involved a certificate, while this case involves an exemption—a distinction without a difference, inasmuch as both involved new route authority. It is most significant that this Court has summarily rejected many of the arguments now advanced by the Board, such arguments being presented by the decision of the lower court in the *Riss & Co.* case.

B. ***Miscellaneous Points Raised in the Board's Brief Are Invalid.***

The Board's brief in this case does not elaborate the position of the Board on the substantive issues, but simply refers to the brief filed by the Board in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board,* No. 567, which case was disposed of by this Court by its order of April 9, 1951. The discussion which follows in this section of this reply brief will be directed to two points made in the Board's brief in No. 567.

The first point so raised by the Board is the suggestion (Board's brief in No. 567, pp. 18-19) that the existence of a judicial review provision in Section 1006 of the Act does not demonstrate the need for a hearing and findings because Section 1006 (c) requires the Board to transmit to the reviewing court "a transcript of the record, *if any,* upon which the order complained of was entered" (italics added), thus indicating that there may be instances where there is no record to support an order of the Board. But that language clearly does not imply that the Board may lawfully act without evidence. At most it suggests either (1) that an order entered without evidence must be set aside by the court, since Section 1006 (e) provides that only such findings of the Board as are "supported by substantial evidence" are conclusive, and Section 10 (e) of the Administrative Procedure Act requires the reviewing court to set aside orders which are "unsupported by substantial evidence" or "unwarranted by the facts"; or (2) that in any case where there is no record before the Board, the order must be reviewed in a *de novo* trial (the authors of the Administrative Procedure Act quite evidently felt that a *de novo* trial was required "in all cases of adjudications where statutes do not require an administrative hearing"—see discussion at pp. 33-35 of Eastern's original brief). Either of the foregoing alternatives requires reversal of the decision of the Court of Appeals in this case,

as the Board's orders are not supported by evidence and Eastern was not granted a *de novo* review by the Court.

The second point raised in the Board's brief in No. 567 (pp. 21-22) is that *Frost* v. *Corporation Commission,* 278 U. S. 515 (1929) was decided under the equal protection of the law clause of the Fourteenth Amendment and therefore has no applicability here, where the due process clause of the Fifth Amendment is involved. But the Board's interpretation of the *Frost* case plainly is erroneous. Injunctive relief was sought in the *Frost* case on the grounds that *both* "the due process and equal protection of the law clauses" had been violated (278 U. S. 519), and the first section of the Supreme Court's opinion dealt with the due process question. The Court found that Frost had a "franchise" to operate a cotton gin which "constitutes a property right" (278 U. S. 520) and that the proposed operation of a competitive cotton gin without a showing of public necessity could be enjoined by Frost because it constituted "an injurious invasion of his property rights" (278 U. S. 521). Having concluded that Frost's property had been taken without due process of law by the authorization of a competitor without hearing as to public necessity, the Court then went further to hold that Frost had *also* been denied equal protection of the law.

Even though the Fifth Amendment does not contain an equal protection of the law clause, it is clear that "there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment." *Currin* v. *Wallace,* 306 U. S. 1, 14 (1939). Plainly such discrimination has occurred here, where Piedmont has been granted—without hearing, evidence or findings—new route authority just the same as that which Eastern and other carriers could obtain only after full hearing and after making a detailed showing of public convenience and necessity.

C. *The Case Is Not Moot.*

As noted above, the Board does not appear to contend seriously that the case is moot. It concedes (pp. 10-13) that the case is governed by the principle of the *Southern Pacific Terminal Company* case, *supra.* However, the Board seems to suggest, hopefully, that (1) the *Southern Pacific Terminal Company* case may have been overruled impliedly by *Amalgamated Association* v. *Wisconsin Employment Relations Board,* 340 U. S. 416 (1951), and (2) the question of the adequacy of the Board's findings is moot.

The *Amalgamated Association* case plainly does not affect the sound principle of the *Southern Pacific Terminal Company* case. The latter case held, in effect, that the mere expiration of a short-term administrative order will not cause the appeal therefrom to become moot where similar short-term orders may continue substantially the same controversy in effect. In the *Amalgamated Association* case, the dispute between the parties had been terminated completely and there was no possibility of recurrence. Thus, this Court concluded that a decision on the merits would be merely "advisory" as it "cannot affect the rights of the litigants in the case" before the Court. On the same ground, this Court determined that case No. 567 was moot because the exemption authority had become merged in a certificate of public convenience and necessity, and therefore there was no possibility of recurrence of the exemption question.

The situation here is completely different. The original exemption authority granted to Piedmont remained in effect beyond the scheduled expiration date (December 12, 1950) by virtue of Section 9 (b) of the Administrative Procedure Act. The Board, for reasons best known to itself, has decided to issue a specific order (dated May 9, 1951) continuing the identical exemption authority in effect (see Appendix B to the Board's brief), even though such an

order was unnecessary in view of Section 9 (b) of the Administrative Procedure Act. Now, simply because the Board has issued a superfluous order, the Board contends that this case has become moot.

Surely the Board has no power to deprive this Court of jurisdiction merely by issuing an order which does not change or affect the legal status of the parties to this litigation.

But even if the Board's order of May 9, 1951, were the only authorization for Piedmont's continued exemption, this case would not be moot under the authority of the *Southern Pacific* case. There the Court said:

> "It will be observed that the order of the Commission required appellants to cease and desist from granting Young the alleged undue preference for a period of not less than two years from September 1, 1908 (subsequently extended to November 15). It is hence contended that the order of the Commission has expired, and that, the case having thereby become moot, the appeal should be dismissed.
>
> "This court has said a number of times that it will only decide actual controversies, and if, pending an appeal, something occurs, without any fault of the defendant, which renders it impossible, if our decision should be in favor of the plaintiff, to grant him effectual relief, the appeal will be dismissed. Jones v. Montague, 194 U. S. 147, 48 L. ed. 913, 24 Sup. Ct. Rep. 611, and Richardson v. McChesney, decided November 28 of this term, 218 U. S. 487, 54 L. ed. 1121, 31 Sup. Ct. Rep. 43. But in those cases the acts sought to be enjoined had been completely executed, and there was nothing that the judgment of the court, if the suits had been entertained, could have affected. The case at bar comes within the rule announced in United States v. Trans-Missouri Freight Asso., 166 U. S. 290, 308, 41 L. ed. 1007, 1016, 17 Sup. Ct. Rep. 540, and Boise City Irrig. & Land Co. v. Clark (C. C. App. 9th C.) 65 C. C. A. 399, 131 Fed. 415.
>
> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary

to define) be the basis of further proceedings. But there is a broader consideration. *The questions involved* in the orders of the Interstate Commerce Commission *are usually continuing* (as are manifestly those in the case at bar), *and these considerations ought not to be, as they might be, defeated; by short-term orders, capable of repetition, yet evading review,* and at one time the government and at another time the carriers, have their rights determined by the Commission *without a chance of redress.*

"In United States v. Trans-Missouri Freight Asso. supra, the object of the suit was to obtain the judgment of the court on the legality of an agreement between railroads, alleged to be in violation of the Sherman law. In the case at bar the object of the suit is to have declared illegal an order of the Interstate Commerce Commission. In that case there was an attempt to defeat the purposes of the suit by a voluntary dissolution of the agreement, and of the attempt the court said: 'The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future . . . Private parties may settle their controversies at any time, and rights which a plaintiff may have had at the time of the commencement of the action may terminate before judgment is obtained, or while the case is on appeal, and in any such case the court, being informed of the facts, will proceed no further in the action. Here, however, *there has been no extinguishment of the rights* (*whatever they are*) *of the public, the enforcement of which the government has endeavored to procure* by a judgment of a court under the provisions of the act of Congress above recited. The defendants cannot foreclose those rights, nor prevent the assertion thereof by the government as a substantial trustee for the public under the act of Congress by any such action as has been taken in this case.' And, referring to the agreement as one claimed by the government as illegal,

it was further said: 'That question the government has the right to bring before the court and obtain its judgment thereof.' The interests there passed upon are no more of a public character than those involved in the order of the Interstate Commerce Commission in the case at bar, and there was no greater necessity for continuing a jurisdiction which had properly attached; and *that the government is the respondent, not complainant, does not lessen or change the character of the interests involved in the controversy, or terminate its questions.*

"In Boise City Irrig. & Land Co. v. Clark, supra, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly *because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.*'

"The motion to dismiss is denied." (Italics supplied.)

Numerous other authorities could be cited for the proposition that the courts will not dismiss a case as "moot" where the matter involved is one of public interest, where the action complained of is one which is capable of repetition and likely to recur, where it is desirable in the public interest to determine the questions involved in order to provide a guide to the public officials involved for action in future case, and where judicial review of the questions involved might otherwise be "defeated, by short-term orders, capable of repetition, yet evading review." A few of the leading authorities on this point are the following: *United States* v. *Freight Assn.*, 166 U. S. 290, 307-310 (1897); *Southern Pacific Co.* v. *Interstate Comm. Comm.*, 219 U. S. 433, 452 (1911); *McGrain* v. *Daugherty*, 273 U. S. 135, 180-182 (1927); *Leonard & Leonard* v. *Earle*, 279 U. S. 392, 398 (1929); *Newport News Co.* v. *Schauffler*, 303 U. S. 54, 58

(1938): *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257 (1938); *Ford Motor Co.* v. *United States*, 335 U. S. 303, 313 (1948); *Papaliolios* v. *Durning*, 175 F. (2d) 73, 75 (C. C. A. 2d, 1949); *Gay Union Corporation* v. *Wallace*, 71 App. D. C. 382, 385, 112 F. (2d) 192, 195 (1940), *cert. denied*, 310 U. S. 647 (1940); *Boise City Irr. & Land Co.* v. *Clark*, 131 Fed. 415, 419 (C. C. A. 9th, 1904); *Walling* v. *Haile Gold Mines*, 136 F. (2d) 102, 105 (C. C. A. 4th, 1943); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 335 (C. C. A. 8th, 1944); *Howard* v. *Wilbur*, 166 F. (2d) 884, 885 (C. C. A. 6th, 1948); *United States* v. *Workingmen's Amalgamated Council*, 54 Fed. 994, 995 (C. C. E. D. La., 1893), *aff'd*, 57 Fed. 85 (C. C. A. 5th, 1893); *United States* v. *Railway Employes' Dept.*, 286 Fed. 228 (N. D. Ill. 1923).

Eastern submits that all of the reasons announced in the foregoing authorities for refusing to dismiss cases as "moot" apply with particular force to this case. The questions involved herein are of great public importance, inasmuch as the Board's power to accomplish by exemption, and *without hearing*, the very same things with respect to which a hearing would be required under the certificate provisions of the Act (Section 401) is presented. If the Board can permit air carriers to evade the requirements of Section 401 simply by the extensive use of the exemption power under Section 416 (b), without hearing, the certificate provisions of the Act are completely meaningless.

It is of greatest importance that the Court render a decision in this case for the future guidance of the Board, the air carriers and the general public. Exemptions of various types are constantly being granted by the Board.

It is apparent that the principle announced by the Court of Appeals in this case is, and is intended to be, applicable to exemptions of the broadest possible scope, including exemptions, as here, whereby certificated routes are exactly duplicated; and the Court of Appeals is asserting that the Board has the power to duplicate any major cer-

tificated route by exemption without affording the certificated carrier any hearing. The Board's brief in No. 567 (p. 16) attempts to intimate, although it carefully refrains from saying, that the asserted exemption power might not be so broad as to "permit the Board to establish a new Chicago-Salt Lake City route by exemption without hearing" or "authorize the acquisition of American Overseas Airlines, Inc., by Pan American World Airways, Inc., and the transfer of the certificates of the former to the latter by exemption without hearing or without reference to the President." But if the Board has the power to duplicate without hearing a certificated route between Winston-Salem and Charleston, what basis is there for supposing that the Board has no similar power to duplicate the Chicago-Salt Lake City route by exemption without hearing? Certainly the Act furnishes no basis for distinguishing between routes of moderate length and those which are transcontinental in scope insofar as the requirement of a hearing before exemption is concerned.

Moreover, the very decision of the Board cited in the Board's brief in No. 567 (p. 16) apparently to show that the Board is not claiming "unrestricted power of exemption" (*Re Large Irregular Carriers, Exemption Applications,* Order E-4240 *et al.,* May 25, 1950), illustrates the sweeping power which the Board claims to duplicate certificated services by exemption. The Irregular Carriers, granted exemption, were authorized to provide service between the major traffic centers of the nation—New York, Chicago, Los Angeles, etc. While the Board sought to limit the number of schedules which could be provided by such carriers, the Board's action in permitting Large Irregular Carriers wastefully to divert traffic from certificated carriers between major points highlights the sweeping character of the exemption power which the Board claims, and the extremely serious nature of the principle announced by the Court of Appeals that exemptions may be granted without hearing.

The Board's brief asserts (p. 12) that the question of the adequacy of the Board's findings to support its expired exemption orders is moot. In view of the fact that the Board issues many exemption orders with precisely the same "findings" involved in this case—"mere parroting of findings or conclusions in the words of statutes" (see Eastern's brief in support of petition, p. 53)—it seems clear that the question of the adequacy of such findings is a "continuing" and "recurring" one, the determination of which "ought not to be * * * defeated, by short-term orders, capable of repetition, yet evading review." *Southern Pacific Terminal Company* case, *supra.* The "findings" in the Board's order of May 9, 1951, are of precisely the same type. It is particularly shocking that the Board should assert the power, by use of "short-term orders," to handle all major matters under the Act purely on the basis of a "belief" and without the necessity for findings of any kind (see discussion at pages 51 *ff.* of Eastern's brief),—avoiding judicial review of such extraordinary procedure.

Application to this case of the doctrine of the *Southern Pacific Terminal Company* case and the other cases cited above requires that the Court proceed to a decision on the very important questions raised by Eastern's petition for writ of certiorari, so that the Board's "short-term orders, capable of repetition," shall not wholly escape review and lead to destruction or serious impairment of the air transport system contemplated by Congress.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed.

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